# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED
March 6, 2007

Plaintiff-Appellee,

v

No. 267085
Wayne Circuit Court
LC No. 05-007773-01

WILLIE LEE MASON,

Defendant-Appellant.

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321; possession of a firearm by felon, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 10 to 20 years' imprisonment for the involuntary manslaughter conviction and three to five years' imprisonment for the possession of a firearm by felon conviction. Defendant was also sentenced to two years' imprisonment for his felony-firearm conviction, which sentence is to run consecutively to the sentences for his other convictions. We affirm.

Defendant argues that the trial court erred in its conclusion that the prosecution exercised due diligence in its effort to locate an endorsed res gestae witness. Defendant argues further that the trial court's error in finding due diligence resulted in a failure to give the missing witness jury instruction, which, in turn, prejudiced defendant's ability to have a fair trial. We disagree.

This Court reviews "a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). A trial court abuses its discretion when its decision falls outside of the range of reasonable and principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 372 (2006) (adopting the standard stated in *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) as the "default" abuse of discretion standard).

A defendant may be entitled to a missing witness jury instruction when the prosecution fails to produce a listed witness at trial or fails to seek leave from the trial court to excuse the witness for good cause. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). The prosecution's exercise of due diligence in attempting to produce a listed witness at trial constitutes good cause to excuse the witness from the list. *People v Canales*, 243 Mich App 571,

577; 624 NW2d 439 (2000). To determine if the prosecution has met its due diligence obligation, the trial court must apply a reasonableness test to the specific facts of the case. *Perez, supra* at 420-421; see also *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998) (discussing due diligence in the context of MRE 804(a)(5)).

The trial court ruled that the prosecution exercised due diligence after weighing the facts and circumstances of the case. The ruling was not an abuse of discretion. In this case, the prosecutor moved to strike the witness from the prosecution's witness list for good cause. The prosecution could not locate the witness. Two law enforcement witnesses testified about their efforts to locate the witness. Their efforts included: searching last known addresses and "hang outs;" interviewing individuals who claimed to know the witness; using undercover units to look for the witness; searching databases for addresses and other information; and using police resources to monitor the witness's outstanding warrant. The trial court's ruling fell within the range of reasonable and principled outcomes. *Babcock, supra* at 269.

In reaching our conclusion, we note that the trial court struggled with the correct state of the law when making its ruling. However, it reached a correct conclusion in determining that the prosecution used due diligence to locate the listed witness. Moreover, a missing witness jury instruction is appropriate only if the trial court finds a lack of due diligence. *Eccles, supra* at 388. Where, as here, due diligence was properly found, it was not an abuse of discretion to refuse to give the missing witness jury instruction.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder